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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91207333
Party	Plaintiff RxD Media, LLC
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Attachments	RxD Opposition to Applicant Motion to Strike Brian Clements Declaration.pdf(209338 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RXD MEDIA, LLC,

Opposer,

v.

IP APPLICATION DEVELOPMENT LLC,

Applicant.

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**Opposition No. 91207333
91207598**

**OPPOSER RXD MEDIA, LLC’S OPPOSITION TO
APPLICANT’S MOTION TO STRIKE PORTIONS OF THE DECLARATION OF
BRIAN CLEMENTS IN SUPPORT OF ITS OPPOSITION TO
APPLICANT’S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and §§ 528.02 and 528.05(b) of the Trademark Trial & Appeal Board Manual of Procedure (“TBMP”), Opposer RxD Media, LLC (“RxD”), by and through counsel, hereby submits its opposition to Applicant IP Application and Development LLC’s (“Applicant”) Motion to Strike Portions of the Declaration of Brian Clements in Support of its Opposition to Applicant’s Motion for Summary Judgment (“Declaration”). For reasons set forth below, Applicant’s Motion should be denied.

The Applicant moves to strike certain statements in Paragraph 6 of the Declaration, asserting that the statements are not based on Mr. Clements’ personal knowledge and that Mr. Clements may not testify as to the consumer perception because he is not qualified as an expert. However, the plain reading of Mr. Clements’ declaration shows that he only testified as to his personal knowledge, understanding and experience, as the founder and the president of RxD, who is familiar with the genesis of RxD and its use of the IPAD mark, the services it offers under that mark and RxD’s experiences with its customers since it began offering its IPAD services in 2007.

The first sentence of this paragraph is based on Mr. Clements' personal knowledge and explains the process by which RxD adopted "IPAD".¹ The second sentence, which is the first statement challenged by Applicant, must be read in the context of the remaining statements in that Paragraph. When properly read together, Mr. Clements' statements merely explain the adoption of the IPAD mark and his understanding of perception of RxD's IPAD brand based on his experience over time. *See Seales v. First Fortis Life Ins. Co.*, 98 F.Supp.2d 456, 461 (S.D.N.Y. 2000)(affiant may testify as to conclusions based on her personal observations over time). The fourth sentence again explains the reasons for RxD's adoption of the mark and a slogan. The fifth sentence is a supportive sentence tending to show that, even for "i" in Apple's IPAD, where the Applicant concedes that the prefix "i" means "Internet", can mean something else. Mr. Clements' reliance on such internet source is permitted, and its probative value is at least equal to that of the Wikipedia or AcronymFinder evidence Applicant has submitted as evidence. TBMP § 704.08(b); Paper 53, Exs. 45 & 51.

Applicant also argues that Mr. Clements' understanding and intended meaning of "i" in RxD's "IPAD" is contrary to the TMEP. (*See* Paper 63, at 3). While the TMEP sets forth a guideline and procedure for the examining attorney, it does not have the force of the law and a party is permitted to present evidence to the contrary. *West Florida Seafood, Inc. v. Jet*

¹ Paragraph 6 of the Declaration, in whole, states as follows:

As stated in RxD's supplemental response, the "I" in "IPAD" was intended to represent the personal nature of the services, and because "I" is synonymous with "my." Exhibit 2, at 3. My understanding is that "I" is not universally thought by consumers to mean "internet" or "internet enabled." As explained in RxD's supplemental response, RxD's experience when it began offering its IPAD services was that potential subscribers did not understand or appreciate the nature of those services because, in 2007, they had no frame of reference by which to understand the unique service RxD was offering. For that reason, RxD adopted a slogan to educate potential subscribers about the nature of its IPAD services. *Id.*, at 2-3. It has also been reported that current consumers do not associate the "I" in IPAD with "internet." *See* Quinten Plummer, *Apple iPhone, iPad, iMac, iPod: Here's What The 'i' Means*, Tech. Times (Feb. 20, 2016), <http://www.techtimes.com/articles/135191/2016220/apple-iphone-ipad-imac-ipod-heres-what-the-i-means.htm>, attached as Exhibit 3.

Restaurants, Inc., 31 F.3d 1122, 1127 n. 8 (Fed. Cir. 1994). Furthermore, the TMEP does not state that “i” definitively means “Internet”, but rather that whether “i” means “internet” is an evidentiary consideration. *See* TMEP § 1209.03(d) (“...with appropriate evidence”, “i” means “internet”) (emphasis added). Evidence that is probative of that issue must therefore be considered.

Mr. Clements’ testimony and supporting evidence is particularly probative here where Applicant has alleged, albeit vaguely, malfeasance on the part of RxD in adopting its Mark, (Paper 53, at 6), relied heavily on inferences to be drawn from internet-based materials rather than expert testimony regarding the meaning of the mark, (*id.*, at 10-12), and obtained approval of its applications based on the meaning of “IPAD” purportedly based on Apple’s use of the term for a tablet computer (*id.* at 9; Paper 60, at 4).

CONCLUSION

For the foregoing reasons, Applicant’s Motion to Strike should be denied, and Mr. Clements’ declaration and supporting evidence considered in its entirety.

Dated: May 3, 2016

Respectfully submitted,

RXD MEDIA, LLC
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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2016, a true copy of the foregoing was electronically mailed to the following:

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